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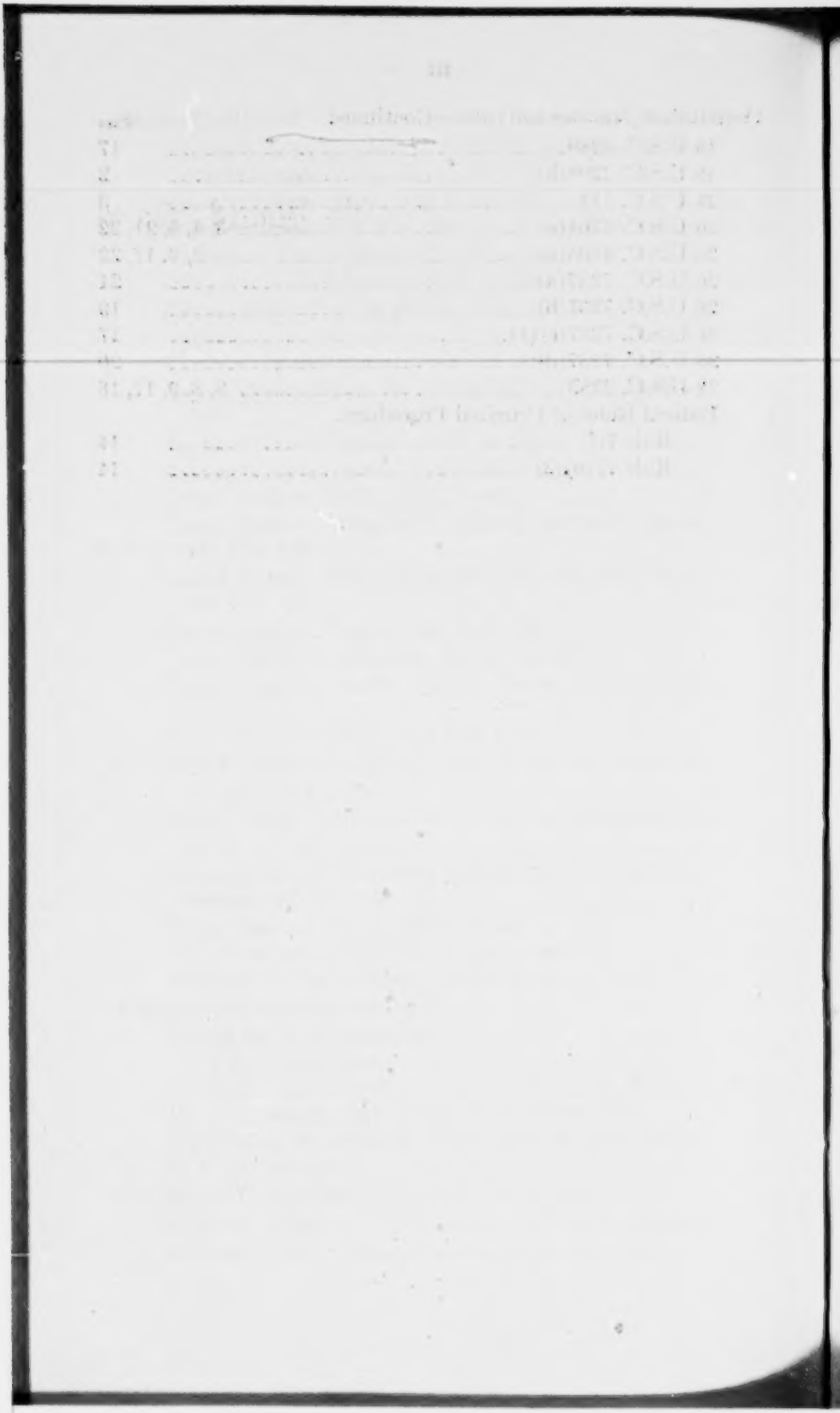

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 29

UNITED STATES OF AMERICA, APPELLANT

v.

CLARENCE EWELL AND RONALD K. DENNIS

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the district court dismissing the indictments (R. 14–26, 59–71) are not reported.

JURISDICTION

On July 13, 1964, the district court dismissed the Ewell indictment on the ground that the defendant had been denied a speedy trial under the Sixth Amendment (R. 14–26). A petition for rehearing (R. 26–35) was denied on July 30, 1964 (R. 39). On July 30, 1964, the district court dismissed the indictment against Dennis on the same ground (R. 59–71). Notices of appeal to this Court were filed on August 28, 1964 (R. 40, 72), and probable jurisdic-

tion was noted on May 17, 1965 (R. 76). The jurisdiction of this Court rests upon 18 U.S.C. 3731.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

QUESTION PRESENTED

After having served a portion of their sentences, imposed following pleas of guilty, appellees were released on motions under 28 U.S.C. 2255, because of a defect in their original indictments, and each was promptly reindicted. The question is whether, under these circumstances, the Sixth Amendment's guaranty of a speedy trial requires dismissal of the new indictments.

STATEMENT

On December 12, 1962, each of the appellees was arrested for selling narcotics without the order form required by 26 U.S.C. 4705(a). The indictments set forth the amount of narcotics sold and the date and place of sale, but did not name the purchaser. Appellees pleaded guilty on December 18 and 19, respectively, in the United States District Court for the Southern District of Indiana. Ewell was sentenced as a second offender to imprisonment for ten years and Dennis (after commitment for study under 18 U.S.C. 4208(b)) was sentenced to imprisonment for five years (R. 15–18, 46–50).

On July 17, 1963, the Court of Appeals for the Seventh Circuit, in an unrelated case, held that an

indictment under 26 U.S.C. 4705(a) which does not allege the name of the purchaser is defective and that a conviction based thereon may be set aside under 28 U.S.C. 2255. *Lauer* v. *United States,* 320 F. 2d 187.[1] On November 6, 1963, Ewell moved to vacate his conviction on the basis of the *Lauer* decision; Dennis did the same on January 28, 1964. The motions were granted on January 13 and April 13, 1964, respectively. On the same days, each appellee was arrested under a new complaint charging the sale of narcotics which had formed the basis of his original conviction (R. 18–20, 50–53).

Two months after arrest, at the earliest session of the grand jury, an indictment in three counts was returned against each appellee, based on the transaction involved in his original conviction. Count 1 charged, as had the original indictments, a sale without an order form under 26 U.S.C. 4705(a); count 2 charged a sale not in the original stamped package, in violation of 26 U.S.C. 4704(a); and count 3 charged dealing in illegally imported narcotics in violation of 21 U.S.C. 174 (R. 20–22, 53–55).

Ewell pleaded not guilty on arraignment, and his appointed counsel moved to dismiss the indictment on grounds of double jeopardy and denial of a speedy trial (R. 22–23, 3–5). On July 13, 1964, the court granted the motion to dismiss on the second ground, but rejected the claim of double jeopardy. The court noted that Ewell had been confined from December

[1] That circuit has since reversed the *Lauer* decision. *Collins* v. *Markley*, 346 F. 2d 230 (*en banc*). See n. 5, *infra*.

12, 1962 (the date of his original arrest); that, despite knowledge of the *Lauer* decision, the government had taken no action either to vacate the judgment or to submit the matter to an earlier grand jury, and that, although it was not a case of neglect by the government or the appellee, "It is litigation resulting from inconsistencies in the developing law that cries out for relief to the defendant." The court also expressed the view that none of the time already served could be credited against his sentence if Ewell were reconvicted (R. 24–26).

The government petitioned for rehearing (R. 26–28), arguing that under established principles it was not required to take and, indeed, could not have taken, affirmative action on the basis of *Lauer* either to vacate the judgment against Ewell or to reindict him. The government further advised the court that upon a plea or finding of guilty, all counts except that under 26 U.S.C. 4704(a) would be dismissed, leaving a conviction upon which the minimum sentence would be only five years for a second offender, in contrast to the ten-year sentence which appellee previously received (R. 28–35). Thus, appellee unquestionably could, in effect, receive credit for the time served. On July 30, 1964, the court denied the petition for rehearing (R. 39).

Similarly, on July 16, 1964, counsel for Dennis filed a motion to dismiss (R. 45–46); and, on July 30, 1964, the district court dismissed that indictment on the ground that Dennis had been denied a speedy trial under the Sixth Amendment (R. 59–71).

The government has limited its appeal to that por-

tion of the order of the district court in each case which dismissed the second count of each indictment, charging a violation of 26 U.S.C. 4704(a). We have done so because this section carries lesser minimum penalties for both a first and second offense, and thus there can be no question of the right of the district court, in fixing sentence, to take into consideration the time already served by appellees.

SUMMARY OF ARGUMENT

Whether there has been a denial of a speedy trial depends on all the circumstances in the particular case. No such denial appears here. In the first place, the delays involved were relatively short. It is not disputed that the period between each indictment and each opportunity for trial—the usual measuring period under the Sixth Amendment—was not excessive, and the time from the date of appellees' illegal acts to their original trials was also, admittedly, short. As to each appellee, the longest period involved was the time between his guilty plea and his successful collateral attack on the original indictment. But the decisions of this Court make it clear that this delay cannot be relied upon to bar reprosecution.

Moreover, no oppressive or purposeful conduct on the government's part caused or contributed to the delay in bringing the present indictments. The original indictments were brought in the justifiable belief that they were in proper form. When the Seventh Circuit subsequently ruled that such indictments were defective, the government could not have been expected to seek appellees' release. The de-

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cision whether to attack their convictions was for appellees to make, and they made it quite promptly. Finally, appellees have suffered no prejudice from being reindicted. The mere fact that the statutes they are charged with violating provide for both minimum and maximum sentences does not constitute undue prejudice. At the most, appellees would be entitled to leniency at the sentencing stage; they should not be allowed to escape prosecution altogether. Indeed, both before the district court and here, the government has chosen to rely only on the lesser of the offenses appellees were charged with, in order to make clear that they need not suffer any greater penalties than those originally imposed.

ARGUMENT

APPELLEES WERE NOT DEPRIVED OF THEIR RIGHT TO A SPEEDY TRIAL UNDER THE SIXTH AMENDMENT

The decision below requires, in effect, that persons who spend time in prison under a voidable conviction—here a little over a year—may not be brought to trial on a new indictment based on the same transaction. This ruling is contrary to established principles. The primary purpose of the Sixth Amendment's speedy trial guaranty is to prevent the prolonged incarceration of an accused without bail prior to trial. By promoting early trial the amendment serves to relieve the accused of the anxiety and public suspicion which delayed prosecution might cause. See *Koenig* v. *Willingham,* 324 F. 2d 62 (C.A. 6), certiorari denied, 376 U.S. 958. It may also assist him in securing the means of establishing his

innocence. But the Constitution has not placed any fixed limitations upon the time in which a case may be brought to trial. As this Court observed in *Beavers* v. *Haubert,* 198 U.S. 77, 87: "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." Where, as here, none of the delays involved was substantial, none was attributable to purposeful or oppressive conduct on the part of the prosecution, and no undue prejudice to appellees resulted, the Sixth Amendment does not require that appellees go free.

A. THERE WERE NO SUBSTANTIAL DELAYS WHICH MAY BE RELIED UPON TO BAR RETRIAL UNDER THE SIXTH AMENDMENT

1. The time ordinarily considered relevant on the issue of speedy trial is the period from the date of indictment to the date of trial. In each appellee's case, the period between his first indictment and first trial and that between his reindictment and opportunity for retrial were, indisputably, not excessive. The permissible period between the commission of a criminal act and the date an offense is formally charged is, in general, governed by the statute of limitations and not the Sixth Amendment. *United States* v. *Simmons,* 338 F. 2d 804, 806 (C.A. 2), certiorari denied, 380 U.S. 983; *Nickens* v. *United States,* 323 F. 2d 808, 809 (C.A.D.C.); *Harlow* v. *United States,* 301 F. 2d 361, 366 (C.A. 5), certiorari denied, 371 U.S. 814; *Foley* v. *United States,* 290 F. 2d 562, 565 (C.A. 8); *Hoopengarner* v. *United States,* 270 F. 2d 465, 469 (C.A. 6);

Iva Ikuko Toguri D'Aquino v. *United States*, 192 F. 2d 338, 350 (C.A. 9), certiorari denied, 343 U.S. 935. Appellees were initially indicted in December 1962 for offenses committed on September 24 and October 31, 1962, respectively. Each was reindicted at the first sitting of the grand jury following his release under 28 U.S.C. 2255, well within the five-year statute of limitations (18 U.S.C. 3282).[2] Thus, even if the indictments dismissed below were the first indictments brought against appellees based on the narcotics sales involved therein, the Sixth Amendment would not bar the trial of those charges.[3] *A fortiori*, where the original in-

[2] Ewell's reindictment came less than 17 months after the sale charged in his first indictment. Dennis' came less than 21 months after the sale he was charged with.

[3] Under the special circumstances found in *Ross* v. *United States*, No. 17,877 (C.A.D.C.), June 30, 1965, the court reversed a conviction on the ground that the delay between offense and arrest resulted in prejudice to the defendant at his trial. Whatever the validity of that decision, it does not apply here. In the first place, the court in *Ross* expressly eschewed reliance on the Sixth Amendment. Moreover, the court made it plain that it was not holding that the bare fact of delay was a bar to trial—appellees' contention here. The court merely ruled that there was prejudice *at the trial* where the prosecution relied on the uncorroborated testimony of a police officer who had to refresh his recollection from notes, while the defendant was unable, due to his and his possible witness' unclear memories and lack of notes, to establish his defense of alibi. The court indicated that, where the prosecution's key witness was supported by corroborating testimony, as in *Hardy* v. *United States*, 343 F. 2d 233 (C.A.D.C.), certiorari denied, 380 U.S. 984, the conviction may properly be allowed to stand, notwithstanding the delay. *Ross* v. *United States*, *supra*, slip opinion, p. 10, n. 4. It should be noted, moreover, that in this case, the trial court made the express finding that "[t]his is not a case for charges of neglect against the government * * *" (R. 25, 71).

dictments were brought promptly[4] and the prime factor in establishing the date of reindictment was appellees' delay in attacking their original convictions, there was no denial of the right to a speedy trial.

2. The only relatively substantial period involved here was the time between each appellee's original conviction and his release under 28 U.S.C. 2255. But this may not be taken as such a delay in properly[5] bringing him to trial as to bar reprosecution under the Sixth Amendment.

In *United States* v. *Ball,* 163 U.S. 622, 672, this Court held that "it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment,

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[4] Ewell was arrested about six weeks after the alleged narcotics sale, indicted two days later, and brought to trial four days after indictment. Dennis was arrested around two-and-a-half months after his alleged narcotics sale, indicted two days later, and brought to trial five days after indictment.

[5] It should be noted that the original indictments were in proper form under the law existing at the time they were filed. See *United States* v. *Debrow*, 346 U.S. 374 (name of person administering oath not an essential element of perjury); *Rivera* v. *United States*, 318 F. 2d 606, 607 (C.A. 9) (name of buyer not essential in indictment for selling narcotics). Moreover, noting that "the Courts in some twenty-five different cases from six Circuits have considered our decision in *Lauer*" and that "[i]n none of them has the *Lauer* decision been approved," the Seventh Circuit, sitting *en banc*, expressly overruled its previous decision, under which appellees' indictments were set aside. *Collins* v. *Markley*, 346 F. 2d 230, 232. See also *United States* v. *Dickerson*, 337 F. 2d 343 (C.A. 6); *Taylor* v. *United States*, 332 F. 2d 918 (C.A. 8); *Jackson* v. *United States*, 325 F. 2d 477 (C.A. 8); *Clay* v. *United States*, 326 F. 2d 196 (C.A. 10), certiorari denied, 377 U.S. 1000.

for the same offence of which he had been convicted." This principle was unanimously reaffirmed in *United States* v. *Tateo,* 377 U.S. 463, 465 (opinion of the Court), 473 (dissenting opinion).[6] As the Court pointed out in that decision: "That a defendant's conviction is overturned on collateral rather than direct attack is irrelevant for these purposes * * *. Courts are empowered to grant new trials under 28 U.S.C. § 2255, and it would be incongruous to compel greater relief for one who proceeds collaterally than for one whose rights are vindicated on direct review." 377 U.S. at 466. Although *Ball* and *Tateo* specifically dealt with the contention that reprosecution after a successful attack upon an original conviction would be barred by the double jeopardy clause of the Fifth Amendment—a contention also made but rejected here[7]—the necessary implication of the principle recognized in those decisions is that reprosecution is likewise not barred by the speedy trial provision of the Sixth Amendment, where, as here, the only significant element of delay is the time passing before the defendant successfully attacks his original

[6] The dissent relied on *Ball* in support of its argument that to bar reprosecution under the facts of the case before it would not bar reprosecution in all cases where the first conviction is overturned due to defects in the trial or, presumably, the indictment.

[7] The district court gave no reason for rejecting defendants' motions to dismiss on double jeopardy grounds (R. 26, 71). Since the decisions came down in the month after *Tateo* and the government specifically argued that *Tateo* "settles the question of double jeopardy contrary to the defendant's position" (R. 59), it may be assumed that the dismissals were based to some extent on that decision.

conviction. In *Tateo* itself, over five years had elapsed between the defendant's conviction and his motion for relief under 28 U.S.C. 2255. See *United States* v. *Tateo*, 214 F. Supp. 560, 562 (S.D.N.Y.). And three more years passed before this Court remanded the case for trial. Indeed in every case in which a defendant obtains his release from prison by motion under 28 U.S.C. 2255, he will have served some period under a voidable sentence. Underlying our system of post-conviction remedies is the assumption that one who moves to have a conviction set aside for error may be subject to reindictment and retrial. As this Court observed in *Tateo*, 377 U.S. at 466:

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest. * * *

This principle was applied by the Eighth Circuit in a case quite similar to this one, *Bayless* v. *United*

States, 147 F. 2d 169, reversed on rehearing on other grounds, 150 F. 2d 236. On January 28, 1938, Bayless was indicted for a robbery which occurred on November 2, 1937. On January 31, 1938, he entered a plea of guilty and was sentenced to twenty years in prison. Five years later, in May 1943, Bayless was released on habeas corpus on the ground that his guilty plea, given while he was without the assistance of counsel, was invalid. He was promptly brought to trial agair on July 12, 1943,[*] and was convicted upon the jury's verdict of guilty. On appeal, he argued, *inter alia,* that his reprosecution constituted a denial of his right to a speedy trial. In rejecting this contention, the court of appeals held (147 F. 2d at 170):

> [I]t is not the law that the mere lapse of such period of time between commission of a crime and trial of an indictment therefor establishes denial of a speedy trial within the intendment of the sixth constitutional amendment. The amendment guarantees the legal right to an accused to demand and to be accorded a trial as soon as the orderly conduct of the business of the court will permit and one complaining of delay must affirmatively demand his right of trial. * * * The facts establish that appellant was accorded all the hearings to which he was entitled in orderly course and was not denied the right of a speedy trial. His own action in pleading guilty, which required the imposition of sentence and resulted in his imprisonment, precluded opportunity or occasion

[*] Unlike the present cases, it was unnecessary for Bayless to be reindicted before being brought to trial.

> for him to demand a jury trial on the indictment until after the granting of the writ of habeas corpus, and he made no such demand. After the issuance of the writ the trial was had with reasonable dispatch. * * *

The decision in *Bayless* was endorsed by the Third Circuit in *United States* v. *Brest,* 266 F. 2d 879, 880, certiorari denied, 362 U.S. 912. Brest had been convicted of kidnapping, bank robbery, and motor vehicle theft on January 20, 1937, released on habeas corpus on March 23, 1939, and reconvicted of the same offenses on May 26, 1939. Relying on *Bayless,* the court rejected his contention that he had been denied a speedy trial.

The same reasoning is applicable here. All proceedings took place in an orderly course, as promptly as was practicable in the circumstances. Any significant delays were occasioned by appellees' litigative decisions,[9] and are not tantamount to the denial of a speedy trial.

B. THERE WAS NO PURPOSEFUL OR OPPRESSIVE GOVERNMENT CONDUCT WHICH CONTRIBUTED TO DELAY

Delay in the determination of guilt following arrest constitutes a denial of a speedy trial by the government only if it is "purposeful or oppressive," *Pollard* v. *United States,* 352 U.S. 354, 361, (see also *Petition*

[9] The present cases are even stronger than *Bayless* in this regard. Ewell's decisions, unlike Bayless', were made with the aid of counsel (R. 16). Dennis made an intelligent waiver of counsel in entering his guilty plea (R. 61) and was aided by appointed counsel in securing release under 28 U.S.C. 2255 (R. 64). Note also that the delay involved in *Bayless* was more than double the delay involved here.

of Provoo, 17 F.R.D. 183, 201 (D. Md.), affirmed, 350 U.S. 857) and results in prejudice to the defendant. Plainly, no such delay is involved here. As we have seen, there was no significant delay on the part of the government either in charging appellees after their crimes were committed or in prosecuting them after their arrests. It is true, of course, that the government "purposefully" brought the original indictments without the purchaser's name on them, in the same sense that it "purposefully" brings any indictment which it honestly and justifiably believes sufficient under the controlling law.[10] Appellees' observation that "[h]ad these names been in the original indictments, the delays would never have occurred" (Motion to Affirm, p. 9), begs the question. The indictments were considered sufficient in law at the time they were drawn, and they would be considered sufficient in law today. Presumably, appellees were fully aware of the particulars of the crimes to which they pleaded guilty. If they had any doubt of the identity of their putative narcotics customer, they could have obtained that information by a motion under Rule 7(f) of the Federal Rules of Criminal Procedure. Or if they felt the indictments were fatally defective as drawn, they could have moved to dismiss them *in limine*. Rule 12(b)(2). The delay following the original indictments surely cannot be laid to "purposeful or oppressive" government conduct. See *United States* v. *Shelton*, 211 F. Supp. 869, 872–874 (D.D.C.), reversed on other grounds, 327 F. 2d 601 (C.A.D.C.).

[10] See n. 5, p. 9, *supra*.

Nor can the government be blamed, as the district court appears to suggest (R. 25, 56), for the delay between the *Lauer* decision and appellees' release under 28 U.S.C. 2255. Even assuming the government's files were so maintained as to alert it to the fact that appellees' convictions were based on the same defect involved in *Lauer*,[11] there was no obligation on its part to move to vacate appellees' indictments. In the first place, the government deemed the *Lauer* decision to be incorrect, as other circuits, now including the Seventh Circuit itself, have held.[12] More funda-

[11] There is no suggestion of any limitation in the district court's reliance on the government's failure to take any "action whatever in expunging or vacating" appellees' judgments (R. 25, 70). The decision seems to impose a burden on the government, each time a new decision is handed down which could affect existing convictions, to move to vacate all affected convictions or else, should the defendants seek collateral relief on their own—the normal procedure—be unable to retry them due to the bar of the Sixth Amendment. The older the conviction rendered voidable by the new decision, the more serious the delay in reprosecution becomes. Thus if the government must affirmatively attempt to release prisoners who have served short periods under a voidable sentence, logically it would have an even greater duty to release those who have been in prison a long time. The burden thus imposed would be practically impossible to carry.

[12] The government's petition for rehearing in *Lauer* was denied on July 17, 1963 (see 320 F. 2d at 191). It then considered petitioning for certiorari, but declined to do so because few cases were expected to be affected by the *Lauer* decision. It should be noted, however, that the stay of the court of appeals' mandate in *Lauer* expired on August 21, 1963. Ewell's efforts to have himself released started on September 6, 1963, and his 2255 motion was filed two months later (R. 18). Dennis' efforts began in October 1963. They were delayed because of the district court's refusal to appoint counsel before a 2255 motion was actually filed. Dennis' motion was filed on Janu-

mentally, the defect in appellees' indictment at most rendered the judgments voidable. *United States* v. *Ball,* 163 U.S. 662, 669. The option whether to serve out the sentences already imposed or to seek to set them aside (with the potential risks and burdens attendant upon that course) was appellees'; the government could not waive appellees' prior jeopardy. Had it sought to vacate the prior convictions, appellees could not have been retried for the same offense. Now, according to the decision below, appellees may not be retired because the government *did not* seek to vacate the prior convictions. There is no justification for imposing this dilemma on the government.[13]

Even assuming that the government could reasonably have been expected to move to vacate appellees' convictions, its failure to do so may not be viewed as a delaying tactic—postponing appellees' inevitable release and thereby their retrial. For such release was not inevitable. Contrary to appellees and the court below, appellees were not compelled to seek collateral relief from their previous convictions. There is no basis, in *Lauer* or elsewhere, for the contention (Motion to Affirm, p. 5) that, had they served out their terms, they could not have pleaded their prior convictions as a bar in a later prosecution for the same

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ary 28, 1964 (R. 64). Thus, almost immediately after the decision in *Lauer* became final, appellees, *on their own*, started their attack on their previous convictions.

[13] It is not alleged here that the government withheld information concerning the *Lauer* decision from appellees. Indeed, their quick response to that decision (see n. 12, *supra*) negates any such implication.

offense.[14] It is not material that, if left unchallenged, the judgments would constitute prior narcotics convictions under 26 U.S.C. 7237(c)(1). Appellees intelligently, and after full opportunity to consult with counsel if they so desired, accepted such convictions when they pleaded guilty to the original indictments. It seems obvious that, by seeking relief from those convictions, they opened the way for retrial on new indictments and reconviction. Also irrelevant are 18 U.S.C. 3288 and 3289, providing for reindictment after the running of the statute of limitations. These provisions only apply when "an indictment is dismissed"; they would have no bearing on appellees' rights had they chosen to serve out their existing terms rather than seek collateral relief.[15] It was for appellees to decide whether an attack on their original convictions would serve their best interests. The time it took them to make that decision—here, a rather short period—may not be held against the government.

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[14] Surely if Ewell, for example, did not attack his conviction and was later indicted for violating 26 U.S.C. 4705(a) by selling 400 milligrams of heroin without the proper order form on October 31, 1962, at Indianapolis (see R. 15), the government would have to prove, in order to rebut his plea of double jeopardy, that the new indictment charges a distinct offense.

[15] If, as the court below held, reprosecution following a successful collateral attack well within the statute of limitations is barred by the Sixth Amendment, reprosecution after the running of the statute would *a fortiori* constitute denial of a speedy trial. By implication, therefore, the decision below questions the constitutionality of Sections 3288 and 3289. Although the constitutional issue was not discussed, this Court's application of Section 3288 in *United States* v. *Durkee Famous Foods, Inc.*, 306 U.S. 68, would seem to refute the notion that that provision runs afoul of the Sixth Amendment.

As the Second Circuit pointed out in *United States* v. *Lustman,* 258 F. 2d 475, 477, certiorari denied, 358 U.S. 880: "The Sixth Amendment prohibits only an unreasonable delay and a defendant cannot exploit a delay which is attributable primarily to his own acts or to which he has consented." See also *Dandridge* v. *United States,* 265 F. 2d 349, 350 (C.A.D.C.).

C. THERE WAS NO PREJUDICE TO APPELLEES

It does not appear that appellees suffered any undue prejudice as a result of any governmental action or inaction in this case. The cases relied on by appellees (Motion to Affirm, p. 9) do not stand for the proposition that the government bears the burden of proving the absence of prejudice whenever a denial of a speedy trial is claimed. Only where there are long unexplained delays have the courts said they would presume prejudice unless the government could establish the contrary. *Petition of Provoo,* 17 F.R.D. 183, 203 (D.Md.), affirmed, 350 U.S. 857 (five years); *United States* v. *Lustman,* 258 F. 2d 475 (C.A. 2), certiorari denied, 358 U.S. 880 (five years); *Williams* v. *United States,* 250 F. 2d 19, 21–22 (C.A. D.C.) (seven years); *Taylor* v. *United States,* 238 F. 2d 259 (C.A.D.C.) (indictment four years after crime and trial two years later). It should be noted that in three of these cases, without relying upon any presumption, the court found in fact that prejudice existed,[16] and in *Lustman,* the court held that there was no denial of a speedy trial.

[16] *Provoo,* 17 F.R.D. at 203, *Williams,* 250 F. 2d at 22–23; *Taylor,* 238 F. 2d at 262.

Apparently, the district court believed that sufficient prejudice to require application of the Sixth Amendment was shown by the fact that, in its view, "none of [the] time served [by appellees] can or will be credited to the lengthy mandatory sentence if [they are] convicted" (R. 25, 71).[17] In so holding, the court misconceived the facts as well as the law.

In the first place, the sentences which might have been imposed upon appellees were not "mandatory" in the sense that a fixed term automatically followed upon conviction. The statutes merely provided, as is quite common, a minimum as well as a maximum term. Thus, in Ewell's case, for example, after his original plea of guilty he could have been sentenced for between 10 and 40 years and fined up to $20,000. (26 U.S.C. 7237(b)). The offenses charged in his second indictment carried no greater penalties. Had Ewell been originally sentenced to 20 years, or fined as well as sentenced—as he might well have been—the district court plainly could have had no doubt that, upon resentencing, it could take account of the penalty already suffered. Upon analysis, therefore, it appears that the only basis for "prejudice" on retrial is the leniency of the sentence originally imposed. Such prejudice, we submit, cannot support a claim of denial of a speedy trial. Moreover, it is by no means clear that the court is correct in assuming that time

[17] As to each appellee, the court also noted that, "[i]f he is acquitted, he will already have served penitentiary time when there was no legal commitment" (R. 25, 71). This factor could not have had a bearing on the court's decision, however, since the same situation results from dismissing the indictments.

already served under a voidable conviction could not be credited against appellees' "mandatory" sentences.[18] If the statutes imposing mandatory minimum sentences would offend the Sixth Amendment if inexorably applied in cases such as this—as the decision below implies—surely those statutes should be read, to avoid conflict with the Constitution, as allowing credit for time previously served.

Furthermore, it appears well settled that the fact that one has served time under a conviction carrying a mandatory minimum sentence is no bar to retrial after release through collateral attack. In *Bayless* v. *United States,* 147 F. 2d 169 (C.A. 8), reversed on rehearing on other grounds, 150 F. 2d 236, and *United States* v. *Brest,* 266 F. 2d 879 (C.A. 3), certiorari denied, 362 U.S. 912, discussed above (pp. 11–13), the courts rejected claims that speedy trial was denied, even though the defendants had been convicted and, after serving part of their terms, reconvicted for offenses carrying mandatory minimum sentences.[19] And as early as 1835, this Court upheld the reprosecution of a defendant who had already served part of his term under a conviction carrying

[18] 26 U.S.C. 7237(d) provides merely that "the imposition or execution of sentence shall not be suspended" and that "probation shall not be granted." It need not be construed as precluding credit under circumstances such as are involved here.

[19] In *Bayless*, the defendant was twice convicted under the Act of May 18, 1934, ch. 304 § 2(b), 48 Stat. 783, then 18 U.S.C. 588b(b), carrying a fine of not less than $1,000 and not more than $10,000, or a jail term of not less than 5 and not more than 10 years, or both. In *Brest*, the defendant was twice convicted of kidnapping, requiring a prison term of not less than 10 years (18 U.S.C. 2113(e)).

a mandatory minimum sentence of one year.[20] *Ex parte Milburn,* 9 Pet. 704, 709–710. (See also *Pollard* v. *United States,* 352 U.S. 354, upholding a two-year sentence following a successful attack on a three-year probated sentence, after defendant had been on probation for two years; *United States* v. *Berry,* 309 F. 2d 311 (C.A. 7), certiorari denied, 372 U.S. 970, involving conviction and reconviction of two of the same offenses involved here.) In any event, the court's concern over possible prejudice in sentencing appellees is premature. The question here is simply whether they should have to stand trial. Whether compensation should be made for time already served is a question more properly reached at the sentencing stage of the prosecutions.

Whether or not there would have been prejudice to the appellees in trying them on indictments carrying a minimum sentence of ten years for Ewell and five years for Dennis,[21] the government's offer to rely only on convictions under 26 U.S.C. 4704(a), carrying a minimum five-year term for Ewell and a minimum two-year term for Dennis (26 U.S.C. 7237(a)), should have dispelled any reservations as to the fairness of proceeding to trial. This offer was made on motion for rehearing,[22] after the court expressed its concern

[20] Act of March 2, 1831, ch. 37, § 12, 4 Stat. 449.

[21] In calculating the minimum sentence that would be "mandatory" under the second indictments, account must be taken of the fact that the court may impose sentences under each count to run concurrently.

[22] A practice encouraged by this Court in *United States* v. *Healy,* 376 U.S. 75, 80. No petition for rehearing was filed in Dennis' case because the denial of the petition in *Ewell* coincided with the dismissal of Dennis' indictment.

over the "mandatory" sentencing provisions of the statutes involved. The position taken by the government at that time is maintained before this Court. The present appeal is only from the dismissal of the count charging a violation of 26 U.S.C. 4704(a). A reversal by this Court will unquestionably permit the trial court, upon conviction, to take account of all the bailable and non-bailable time appellees served in connection with the charges originally brought against them. Even if the Sixth Amendment were a bar to reindictment under Section 4705(a)—which, we submit, is not the case—it surely cannot bar trial on the lesser offense now before the Court.

CONCLUSION

For the reasons stated, we respectfully submit that this Court should reverse the judgments below and reinstate count two of each indictment.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

JEROME I. CHAPMAN,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

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